No. 49800-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

GARY W. BOGLE
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Kalo Wilcox
Cause No. 16-1-00184-84

BRIEF OF RESPONDENT

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B. STATEMENT OF THE CASE.

1. Substantive Facts.

On May 16, 2015, Gary Bogle was cited in Olympia for drinking in public, and at the time of citation, provided his brother's name, Ronnie Bogle, and his brother's date of birth as a means of identification. CP 4. Following this incident, Olympia Police Officer Theis was contacted by Ronnie Bogle, who resides in Santa Clara, California, regarding the incident. Id. Ronnie Bogle gave Officer Theis a Fraud report, alleging that his brother, Gary Bogle, had been using his identity for several years, including during arrests

and previously had warrants issued for his arrest. Id. Ronnie Bogle referred to the May 16, 2017 citation for drinking in public, in which he alleged Gary Bogle had used his brother's identification; Ronnie Bogle confirmed that he had not been in Washington at that time. Id.

Thereafter, on October 30, 2015 at 1:20 a.m., Officer Theis spoke with Gary Bogle in Olympia, who once again provided his brother's name, Ronnie Bogle, along with his brother's date of birth as a means of identification. CP 4. At that time, Officer Theis had insufficient information to disprove that he was Ronnie Bogle, and that he was in fact Gary Bogle. CP 5. Immediately after this encounter, Officer Theis contacted the Santa Clara Sherriff's Department to obtain a photo of Gary Bogle, to identify him properly. Id. The Sherriff's Office warned Officer Theis that Gary Bogle had a felony warrant for ten counts of False Impersonation out of Santa Clara. Id. The next day, a Detective from Santa Clara contacted Officer Theis and confirmed that Gary Bogle had been using his brother, Ronnie's, name, social security number, and date of birth for several years, and that the Detective had been investigating him for some time. Id. The Detective also sent Officer

Theis a photo of Gary Bogle, and Officer Theis determined it was clearly the individual he had spoken with the day prior. Id.

On November 3, 2015, Olympia Police Officer Sola contacted Ronnie Bogle in Santa Clara, as a follow-up to his earlier conversation with Officer Theis. Id. Ronnie Bogle stated he had checked his credit report after being rejected for a credit card, and the report showed dozens of unpaid medical bills for treatments Ronnie had never received, and in several states he never visited, including Washington. Id.

On November 7, 2015, Officer Theis located Gary Bogle and arrested him. Id. At the time of arrest, Gary Bogle once again provided his brother's name and date of birth as a means of identification. Id. During booking, it was determined that he was in fact Gary Bogle, and not Ronnie Bogle. Id. When Officer Sola contacted Gary Bogle at the jail and read him his Miranda warning, Gary Bogle admitted he had been using his brother's name and date of birth for the last eleven years. Id. He also admitted that he gave his brother's name and date of birth as a means of identification when he was cited on May 16, 2015. Id. Gary Bogle was then extradited to Santa Clara, California, on November 7,

2015, for the felony warrant for ten counts of False Impersonation in that jurisdiction. CP 11.

On March 14, 2016, the Thurston County Superior Court received a letter from Gary Bogle, notifying them that he had plead no contest to ten counts of "identify theft" in Santa Clara, and had been sentenced to sixteen months. Id. He was requesting an extradition hold be lifted, so he could face the Thurston County charges for Identity Theft. Id.

Thereafter on June 7, 2016, the Thurston County Superior Court received another letter requesting an update on his request to lift the extradition hold. CP 13. With this letter, he included a document from the Santa Clara County Superior Court, which listed his ten charges in violation of Penal Code (PC) 529, along with the sixteen-month sentence he previously referenced. CP 12, 14.

2. Procedural Facts.

On February 13, 2016, the Thurston County Prosecuting Attorney's Office charged Gary Bogle with three counts of identity theft in the second degree for the dates of May 16, October 30, and November 7, 2015. An additional two charges of identity theft in the first degree were later added, stemming from incidents in King County which were referred to the Thurston County Prosecuting

Attorney. The Defendant plead guilty to all counts on November 30, 2016, and was sentenced to 84 months confinement on December 12, 2016.

At the time of charging in Thurston County, the Defendant was also awaiting sentencing in Santa Clara County, California after pleading guilty to ten counts of false impersonation in violation of California Penal Code (P.C.) 529. On March 8, 2016, the Defendant was sentenced in Santa Clara County, California to 16 months incarceration.

C. ARGUMENT.

1. The trial court did not err in calculating Gary Bogle's offender score at sentencing, and he waived his right to challenge his offender score on appeal.

a. Standard of review.

RCW 9.94A.525 guides a trial court's determination of a defendant's offender score at sentencing. In considering out-of-state convictions, it states:

> Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction,

> the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

RCW 9.94A.525(3).

Washington courts employ a two-part test to determine the comparability of a foreign offense.

> A court must first query whether the foreign offense is *legally* comparable—that is, whether the elements of the foreign offense are substantially similar to the elements of the Washington offense. If the elements of the foreign offense are broader than the Washington counterpart, the sentencing court must then determine whether the offense is *factually* comparable—that is, whether the conduct underlying the foreign offense would have violated the comparable Washington statute.
>
> State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007) (citing State v. Morley, 134 Wn.2d 588, 952 P.2d 167 (1998).

The Washington State Supreme Court has interpreted RCW 9.94A.525 to require "substantial similarity" between the elements of the foreign offense and the Washington offense in order to find them legally comparable. State v. Jordan, 180 Wn.2d 456, 461, 325 P.3d 181 (2015). If the elements of the foreign offense are found comparable to those of a Washington offense, and thus they are legally comparable, then "the inquiry ends" and the foreign

crime counts toward the offender score as if it were the comparable Washington crime. Id.

Where the elements of the Washington crime and the foreign crime are not substantially similar, the Washington State Supreme Court has held that the sentencing court may then look at the defendant's conduct, as evidenced by the indictment or information, to determine if the conduct itself would have violated a comparable Washington statute. In re Personal Restraint of Lavery, 154 Wn.2d 249, 255 111 P.3d 837 (2005) (citing Morley, 134 Wn.2d at 606, 952 P.2d 167). When making that factual comparison, the sentencing court may rely on facts in the foreign record that are "*admitted*, stipulated to, or proved beyond a reasonable doubt." Lavery, 154 Wn.2d at 258; State v. Farnsworth, 133 Wn. App. 1, 22, 130 P.3d 389 (2006). If in convicting the defendant, the foreign court "necessarily found facts that would support each element of the comparable Washington crime, then the foreign conviction counts toward the defendant's offender score." Farnsworth, 133 Wn. App. at 18 (citing State v. Russell, 104 Wn. App. 422, 441, 16 P.3d 664 (2001)).

Under the Sentencing Reform Act (SRA), the State bears the burden to prove by a preponderance of the evidence the existence

and comparability of a defendant's prior out-of-state conviction. State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004) (citing State v. McCorkle, 137 Wn.2d 490, 495, 973 P.2d 461 (1999)). However, although the State generally bears the burden of proving the existence and comparability of a defendant's prior out-of-state and/or federal convictions, the Washington State Supreme Court has stated a defendant's affirmative acknowledgment that his prior out-of-state and/or federal convictions are properly included in his offender score satisfies SRA requirements. Ross, 152 Wn.2d at 230 (citing State v. Ford, 137 Wn.2d 472, 483 n. 5, 973 P.2d 452 (1999)). Gary Bogle gave such affirmative acknowledgements, relieving the State of this burden.

b. The trial court had sufficient information on Gary Bogle's California convictions to make a determination of the offender score.

Gary Bogle now claims that essentially the only proof of his prior convictions was the prosecutor's statement of criminal history. Appeal at 5. Aside from the fact that he signed the statement in affirmation, he also admitted the convictions to the trial court directly; he wrote multiple letters to the trial court before he plead guilty, which discussed his California convictions in detail. CP 11, 13, 22-23, 30-31. "I plead no contest to ten counts of Identify Theft

here and received 16 months in jail." CP 11. "I was extradited to Santa Clara County Jail and received a 16-month sentence for the 10 charges or 10 counts ... P.C. 529 False Impersonation of Another Person." CP 23. Moreover, in one of his letters he included an official document from the Santa Clara County Superior Court detailing his California conviction and sentence. CP 12, 14. The trial court had sufficient information from the defendant's own admissions to make an offender score determination.

Gary Bogle then claims that "a defendant's admission of the fact of the conviction does not relieve the State of its burden to produce reliable evidence for the court to conduct a comparability analysis," relying on Thiefault for that authority. Appeal at 7, citing State v. Thiefault, 160 Wn.2d 409, 424 f.3, 158 P.3d 580 (2007). However, the court in Thiefault did not reach this expansive of a holding. Indeed, in its conclusion it stated:

> We direct the superior court to conduct a factual comparability analysis to determine whether the conduct underlying Thiefault's Montana conviction constitutes attempted robbery under Washington's narrower statute. In making such a determination, the superior court may rely on only *those facts that Thiefault stipulated or admitted to* or those that were proved beyond a reasonable doubt.

Id. at 420.

Thus, if a defendant admits facts to the court, under Thiefault those facts may be used in conducting a factual comparability analysis and determining an offender score.

> c. Appellant affirmatively acknowledged that his California convictions were properly included in the offender score.

In addition to Gary Bogle's admissions of the existence of his California convictions, he also affirmatively acknowledged that they had been properly included in his offender score. On the Prosecutor's statement of Criminal History, CP 46, the following statement is placed after the Deputy Prosecuting Attorney's signature block and before the defendant's signature block.

> The defendant and the defendant's attorney hereby stipulate that the above is a correct statement of the defendant's criminal history relevant to the determination of the defendant's offender score in the above-entitled cause.

CP 46.

The Statement of Criminal History lists ten counts of Criminal Impersonation, sentenced in Santa Clara, CA, on May 14, 2015. Gary Bogle signed the document, which was attached to his plea form, when he plead guilty on November 30, 2016. The Statement of Defendant on plea of guilty he signed also contained additional

attached documents showing the inclusion of the California convictions in his offender score. CP 36, 47, 48. Moreover, the Statement of Defendant on Plea of guilty contained express acknowledgment that "each crime with which I am charged carries a maximum sentence, a fine, and a Standard Range Sentence as follows," which is followed by a grid in which Bogle acknowledged that each offense had an offender score of 9+. CP 36.

The Washington State Supreme Court has reaffirmed the holding from Ford in that "a defendant's *affirmative acknowledgment* that his prior out-of-state and/or federal convictions are properly included in his offender score satisfies SRA requirements." Ross, 152 Wn.2d at 230 (citing State v. Ford, 137 Wn.2d 472, 483 n. 5, 973 P.2d 452 (1999)). In Ross, one defendant plead guilty to second degree attempted robbery, and one defendant was found guilty by a jury trial of possession with intent to deliver cocaine. Ross, 152 Wn.2d at 226-27. Both had out-of-state convictions, which were included in their offender score at sentencing. Id. "Both defendants affirmatively acknowledged at sentencing that their prior out-of-state and/or federal convictions were comparable to Washington State crimes and thus, were properly included in their offender score." Id. at 230. On appeal,

they argued that the trial court improperly included their prior out-of-state and/or federal convictions in their offender scores, because the State had not proven the comparability of those convictions to Washington offenses. Id. The court rejected this argument, and held that the trial court had complied with the SRA in relying on the defendant's affirmative acknowledgements that their offender scores properly included prior out-of-state convictions. Id. at 241.

Beyond Gary Bogle's signed affirmative acknowledgement of his convictions, the trial court judge went further and verbally confirmed with Gary Bogle at his change of plea hearing that he had affirmed his California convictions. VRP November 30, 2016 at 5. The trial court judge also confirmed with Gary Bogle that he understood the California convictions would be part of his offender score calculation, increasing the standard sentencing range for his Washington convictions. Id. Gary Bogle answered affirmatively to each of the judge's questions. Id. As such, the SRA requirements regarding offender score determination were satisfied in this case.

d. The Appellant waived his right to challenge the calculation of his offender score.

The right of a defendant to argue that his offender score has been miscalculated can be waived, particularly in cases where a

defendant enters a plea of guilty. State v. Collins, 144 Wn. App. 547, 555, 182 P.3d 1016 (2008); State v. Ross, 152 Wn.2d 220, 95 P.3d 1225 (2004). At his change of plea hearing, the trial court judge asked Gary Bogle the following:

> Mr. Bogle, do you understand if I accept your guilty plea to the five counts in the first amended information you're going to be giving up all the rights that you and Mr. Pilon have discussed and that are within your plea statement? That includes your right to later appeal any sentence the Court gives you provided it's in the standard range that I just reviewed with you.

VRP November 30, 2016 at 6.

Gary Bogle confirmed that he understood that he would be waiving such rights, including rights of appeal on the standard range sentence he received.

In Collins, the defendant signed a plea agreement which recommended a specific sentence for second degree assault and unlawful imprisonment with sexual motivation, based on a specific offender score which included out-of-state convictions. State v. Collins, 144 Wn. App. 547, 549, 183 P.3d 1016 (2008). Attached to the plea agreement was a Prosecutor's Understanding of Criminal History which listed defendant's convictions from California, which was signed in affirmation by the defendant, along with scoring

forms showing the defendant's calculated offender score, including the out-of-state convictions. Id. at 550-51. At sentencing, after the court had accepted the plea agreement, the defendant then attempted to argue that the trial court could not include the out-of-state convictions in his offender score unless the State proved them to be factually comparable to a Washington offense. Id. at 549. The trial court concluded that the defendant had breached the plea agreement, rescinded it, and reinstated the original charge. Id. The defendant then sought discretionary review to reinstate the plea agreement, with remand for a revised sentencing hearing during which the trial court would determine the comparability of his California offenses. Id. at 553.

On discretionary review, the defendant argued that it was the responsibility of the court to calculate the offender score correctly, notwithstanding his plea agreement, and further that the State could not prove the California convictions were truly comparable. Id. at 553-54. The court of appeals rejected this argument, finding that the defendant affirmatively acknowledged that his foreign convictions had been properly included in the offender score, and so the trial court did not need further proof of classification before imposing a sentence based on that score. Id. at 555. "When [the

defendant] signed the plea agreement and agreed that his criminal history and the scoring forms were "accurate and complete," he relieved the State of its burden to present certified records proving that his conduct during the commission of the California offenses made those offenses factually comparable to the more narrowly defined Washington offense." Id. at 557.

Similarly, here Gary Bogle signed the plea agreement and agreed that his criminal history and scoring forms were accurate and complete. In doing so, he relieved the State of its burden to show that his conduct during his California offenses made those offenses factually comparable to the Washington offenses. As such, he waived his right to appeal the sentence which was imposed pursuant to his guilty plea.

2. Gary Bogle's crimes were not "same criminal conduct" in the meaning of RCW 9.94A.589.

a. Standard of review.

RCW 9.94A.589 defines when crimes which qualify as "same criminal conduct" would only be counted as one point when calculating a defendant's offender score for the purposes of sentencing.

> Except as provided in (b), (c), or (d) of this subsection, whenever a person is to be

> sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.

RCW 9.94A.589(1)(a).

RCW 9.94A.589 also defines "Same criminal conduct" in the meaning of the statute.

> "Same criminal conduct," as used in this subsection, means two or more crimes that *require the same criminal intent*, are *committed at the same time and place*, and *involve the same victim*.

RCW 9.94A.589(1)(a).

The Legislature intended the phrase "same criminal conduct" to be construed narrowly by Washington courts. State v. Flake, 76 Wn. App. 174, 180, 883 P.2d 341 (1994)). The trial court also has discretion to determine whether crimes constitute same criminal conduct, and that discretion is reviewed for abuse of discretion or misapplication of the law. "The trial court's determination whether two offenses require the same criminal intent is reviewed by this court for abuse of discretion or misapplication of the law." State v.

Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994) (also see Flake, 76 Wn. App. at 180).

The absence of either same criminal intent, commission of crime at same time and place, or commission of crime against same victim, prevents finding of "same criminal conduct" which would preclude scoring additional current convictions as if they were prior convictions. State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). Gary Bogle states that "whether offenses involve the same criminal intent depends on "the extent to which the criminal intent, as objectively viewed, changed from one crime to the next,"" relying on Dunway. Supplemental Brief of Appellant at 2-3; State v. Dunway, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987) (citing State v. Edwards, 45 Wn. App. 378, 725 P.2d 442 (1986)). However, the Dunway court went further and stated that "as it did in Edwards, part of this analysis will often include the related issues of whether one crime furthered the other and if the time and place of the two crimes remained the same." Dunway, 109 Wn.2d at 215. Gary Bogle argues that his ten California convictions constituted "same criminal conduct," and separately that his five Washington convictions constituted "same criminal conduct."

b. Gary Bogle's Washington convictions were not "same criminal conduct."

Gary Bogle argues that his Washington convictions should be considered same criminal conduct because "they encompassed the same crime, same intent, and same victim." Supplemental Brief of Appellant at 4. However, crimes must still be committed at the same time and place to be considered same criminal conduct. Gary Bogle relies on Porter to argue that crimes committed in a short period of time can satisfy this requirement. Id.; State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). However, in Porter, the offenses in question occurred within ten minutes of each other. Porter, 133 Wn.2d at 180. Additionally, the Porter Court found that "the sales were part of a *continuous, uninterrupted sequence of conduct* over a very short period of time." Id. at 183. Gary Bogle admits in his own argument that the Washington crimes were committed on April 19, May 16, September 17, October 30, and November 7, 2015. Supplemental Brief of Appellant at 4. With at least one week between each crime, unlike the ten minutes in Porter, the crimes cannot be said to be a continuous, uninterrupted sequence of conduct. As such, the time requirement to establish same criminal conduct has not been met.

Additionally, the "same place" requirement has not been met. Three of Gary Bogle's Washington offenses were committed in Thurston County, at disparate locations within the county, and the other two offenses were committed in King County. Additional uncharged, but similar, offenses were committed in Grays Harbor County. In Price, a Thurston County case, the defendant was charged with four counts of attempted first degree murder of a vehicle's driver and passenger, and other crimes, with firearm enhancements. State v. Price, 103 Wn. App. 845, 848-49, 14 P.3d 841 (2000). The first shooting took place while stopped on a parkway, and the second shooting took place after a short pursuit, while traveling on the interstate. Id. The defendant argued that the two shootings should constitute same criminal conduct. Id. at 854-55.

The court of appeals rejected this argument, finding that the crimes were not committed in the same time and place, and that there was not a "continuing, interrupted sequence of conduct." Id. Specific to the location element, the court of appeals considered the following in its analysis:

> The trial court concluded that the two shootings took place at two sufficiently distinct, separate locations to make Price's criminal conduct

> separate and distinct. Here, the trial court was correct. Price first fired into Nakano's vehicle while stopped on the Deschutes Parkway, within the Tumwater city limits. (Counts I and II). The second shooting took place when both cars were traveling on the interstate, within the Olympia City limits. (Counts III and IV). Consequently, the two incidents took place at *two different physical locations*, and therefore did not constitute the "same criminal conduct.

Id.

Considering the strict standard applied in Price regarding the "same place" for the purpose of same criminal conduct, Gary Bogle cannot be said to have committed all five Washington offenses in the "same place." Rather, each was committed in distinct and separate physical locations, insufficient to meet the burden of same criminal conduct.

c. Gary Bogle's California convictions were not "same criminal conduct."

Gary Bogle relies on the document from the Santa Clara Superior Court which he mailed to the Thurston County Superior Court to claim that the offenses convicted in California occurred at the same time and place, with the same intent, and with the same victim. Supplemental Brief of Appellant at 3; CP 12-14. At sentencing for his Washington offenses, Gary Bogle's defense counsel discussed speaking with the attorney who had represented

Gary Bogle in Santa Clara, California, where he'd pled guilty to ten counts of False Impersonation.

> Part of the issue with that was that those crimes that he pled to in California actually stem from *incidents* in Seattle.

VRP December 12, 2016 at 11.

Had the ten California charges arisen from a single instance where Gary Bogle had the same criminal intent, at the same time and place, and against the same victim, Gary Bogle's defense counsel would be using the language "incident" instead of "incidents." As previously discussed, the court in Price enumerated a stringent standard for finding the "same time and place" for the purpose of same criminal conduct. State v. Price, 103 Wn. App. 845, 14 P.3d 841 (2000). It is unlikely that the ten offenses took place within mere minutes of each other, let alone within the same day that Gary Bogle takes from the Santa Clara document.

In addition to setting a stringent standard for "time and place," the court in Price also discussed a high standard for "same intent." Id. at 856-57. In Price, as discussed, the court determined that the two shootings were not a continuous, uninterrupted sequence of conduct and further took place at two different physical locations, despite being in somewhat close proximity by time and

location. Id. at 854-55. Because the time and place element was not satisfied, the court did not need to examine intent, but chose to do so anyway. Id. at 856.

In evaluating intent, the Price court considered the underlying statutes, facts, and whether one crime furthered the other. Id. at 857. The court also stated that "even crimes with identical mental elements will not be considered the "same criminal conduct" if they were committed for different purposes." Id. (citing State v. Haddock, 141 Wn.2d 103, 113, 3 P.3d 733 (2000)). The determinative factor in Price was whether the defendant had sufficient time to form a new criminal intent, even though the second offense had identical elements to the first and was factually similar.

> Here, Price made the choice to return to the stolen Silverado, start the truck, and pursue the victims onto the interstate. This allowed time for Price to form new criminal intent. Like the defendant in Grantham, Price had time to decide either to cease his criminal conduct or to commit a further criminal act.

Price, 103 Wn. App. at 848.

Here, the purposes behind Gary Bogle's many offenses of identity theft often differed. Just considering his three Thurston County offenses as an example, the first identity theft offense took

place when Gary Bogle was cited for drinking in public; he likely gave his brother's identity to avoid responsibility for the citation. The second offense took place when Officer Theis spoke with Gary Bogle, after speaking with Ronnie Bogle; he was not being cited at that time, so his purpose for giving another identity was not the same as in the first offense. The third offense took place when he was arrested for the outstanding California warrant; he once again gave his brother's identity, this time likely to try and avoid arrest for that specific warrant. Neither of these three offenses had sufficiently similar intent to constitute same criminal conduct under Price.

Considering his crimes as a whole, they often differed even more significantly. According to Ronnie Bogle's victim impact statement, Gary Bogle used his identity for a wide variety of reasons; credit cards, doctor's visits, emergency room visits, Medicaid claims, ambulance charges, criminal charges, tickets, issued citations, even filing taxes. CP 52-53. Because the vast majority of these offenses were committed with sufficient time intervals to form new criminal intent, and for different purposes under the Price standard, it is highly unlikely each of the California

offenses was committed with the same intent for the purposes of same criminal conduct.

When interviewed by law enforcement at the Thurston County Jail after his arrest and his true identity was confirmed, Gary Bogle himself admitted he had been using his brother's name and date of birth for the previous eleven years. CP 5. When Officer Theis spoke with a Detective from the Santa Clara Police Department, the Detective stated he had been investigating Gary Bogle for a long time, and that Gary Bogle had been using his brother's identity for years. CP 5. The full extent of Gary Bogle's crimes across multiple states over such a lengthy period of time will likely remain unknown. Certainly each of his crimes are unlikely to be a "continuing, interrupted sequence of conduct" as discussed in Price. Price 103 Wn. App. at 854-55. Considering the standard for same criminal conduct, requiring the intent, time and place, and victim elements be continually satisfied, it is equally unlikely that Gary Bogle's California offenses were a continuing, interrupted sequence of conduct as required for same criminal conduct. As such, this court should not presume so.

d. The Appellant waived his right to challenge the calculation of his offender score, including on the basis of "same criminal conduct."

As previously discussed, Gary Bogle gave affirmative acknowledgement that his out-of-state convictions were properly included in his offender score, and with each offense counted as a separate point. In doing so, he waived his right to challenge his offender score on appeal when he plead guilty, including on the basis of whether they were same criminal conduct.

3. Gary Bogle had effective assistance of counsel.

a. Standard of review.

Appellant claims that his trial counsel's failure to object to the trial court's calculation of his offender score was so deficient and unreasonable that he was deprived of his constitutional right to effective assistance of counsel. Both the Washington and federal constitutions guarantee a defendant the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). There is a strong presumption that defense counsel's conduct is not deficient. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Claims of

ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail in an ineffective assistance of counsel claim, a defendant must show that 1) his trial counsel's performance was deficient and 2) this deficiency prejudiced him. Strickland, 466 U.S. at 687. Deficient performance is that which falls below an objective standard of reasonableness. State v. Horton, 116 Wn. App. 909, 912, 68 P.3d 1145 (2003). Prejudice occurs when trial counsel's performance is so inadequate that there is a reasonable probability that the trial result would have differed, undermining confidence in the outcome. Strickland, 466 U.S. at 694. If a defendant fails to establish either prong, the claim automatically fails without consideration of the remaining prong. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996) (*overruled on other grounds by* Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006)).

A reviewing court will not find ineffective assistance of counsel if the action complained of goes to trial tactics or the defense theory of the case. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1995). It is also well established that "[a] lawyer may properly make the tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit

disapproval." Brookhart v. Janis, 384 U.S. 1, 8, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966).

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 694-95.

b. Defense counsel acted reasonably in not contesting the trial court's offender score determination.

As discussed, the trial court made a proper determination of the defendant's offender score. The defendant wrote letters to the trial court admitting and detailing his California convictions, he affirmed that the convictions were properly included in the offender score, and in doing so he waived his right to challenge the determination on appeal. Defense counsel acted as a reasonable attorney in not objecting to the offender score determination, because at that time it was clear that it had been properly calculated.

c. Defense counsel acted reasonably in not contesting whether Gary Bogle's crimes were "same criminal conduct."

As discussed, neither Gary Bogle's Washington convictions nor his California convictions constitute same criminal conduct. The Washington offenses were committed at different dates with large time intervals between offenses, and were committed at different locations throughout Thurston and King County for different purposes. Similarly, the California offenses are highly unlikely to meet the standard of a continuous, uninterrupted sequence of conduct committed with the same intent and for the same purpose. Given the high burden to establish the elements of same criminal conduct, a reasonable attorney at that time would not have found the facts of this case sufficient to meet that burden.

c. Gary Bogle did not suffer prejudice from his counsel's performance.

In addition to having effective assistance of counsel, the defendant also did not suffer any prejudice from his counsel's performance. The defendant had the benefit of a plea bargain in this case, which did not include additional charges which could have been filed from incidents in Grays Harbor County. VRP December 12, 2016 at 15. Contesting the trial court's determination of the sentence range likely would have resulted in

rescission of the plea agreement, as in Collins. Collins, 144 Wn. App. 547. Had the defendant been charged in Grays Harbor County as well as Thurston County, the Grays Harbor County charges would have resulted in additional sentences being imposed consecutively. Id. As part of the plea agreement, the State also agreed not to seek an exceptional sentence upward based on the existing aggravating factors. Id. With such an offender score, the defendant would likely have been subject to a significant exceptional sentence well beyond the 84 months he received as part of this plea agreement.

4. Gary Bogle's Washington State sentence should be served concurrently with the remainder of his California State sentence.

a. Standard of review.

RCW 9.94A.589 states in part that:

> Whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

RCW 9.94A.589(3).

RCW 9.94A.589(3) gives a judge discretion at sentencing to impose either a concurrent or consecutive sentence for a crime the defendant committed before he started to serve a felony sentence for a different crime. State v. King, 149 Wn. App. 96, 101, 202 P.3d 351 (2009). The imposition of a consecutive sentence is not considered an exceptional sentence that would otherwise require a finding of aggravating factors. Id. (citing State v. Jones, 137 Wn. App. 119, 126, 151 P.3d 1056 (2007)). The sentencing judge need only order that the sentences be served consecutively; no reason for the decision is required. Id. (citing State v. Mathers, 77 Wn. App. 487, 494, 891 P.2d 738 (1995)).

b. The State does not oppose Gary Bogle's argument on whether his Washington State and California State sentences should be served concurrently.

The record does not appear to reflect an express order from the sentencing judge that his Washington State sentence be served consecutively with his California State sentence, and so pursuant to RCW 9.94A.589 it may be served concurrently with any remaining portion of the California sentence. The trial court did not state in the Judgment and Sentence that the sentence would be consecutive, therefore, by operation of RCW 9.94A.589, the plain language of the Judgment and Sentence would allow for the

sentence imposed to run concurrently with the remaining portion of the California sentence. CP 63. The sentence does not run concurrent with the time served in California prior to Gary Bogle being brought to Washington because he was confined on the California cause and had not yet been sentenced on the this case. RCW 9.94A.505(6), CP 63. Bogle correctly points out "where the court pronouncing the current sentence does not order that it be served consecutive it is to be served concurrent to that sentence." Brief of Appellant at 13.

The action requested by Bogle should occur by operation of law and the plain meaning RCW 9.94A.589 and the Judgment and Sentence. CP 59-70. "The Department of Corrections is not authorized to either correct or ignore a final judgment and sentence." Dress v. Dep't of Corrections, 168 Wn.2d 319, 322, 279 P.3d 875 (2012). For defendants who are sentenced for a felony they committed while not under sentence for a felony conviction, the sentences must run concurrently with prior sentences unless the court orders that they be served concurrently. In re Pers. Restraint of Green, 170 Wn. App. 328, 333-334, 283 P.3d 606 (2012). The Judgment and Sentence makes clear that the offense dates for the current convictions all predated the California

sentencing date. CP 59, 61. The proper interpretation of Bogle's sentence should not require any further clarification from the trial Court, therefore, remanding the matter to the trial Court is not necessary.

5. This court should impose appellate costs if the State substantially prevails on this appeal.

a. Standard of review.

Under RCW 10.73.160, "the court of appeals, supreme court, and superior courts may require an adult offender convicted of an offense to pay appellate costs." RCW 10.73.160(1). Rule of Appellate Procedure (RAP) 14.2 governs the potential imposition of appellate costs where one party substantially prevails.

> A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review, or unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs.

RAP 14.2.

Any evidence may be considered in determining whether to impose appellate costs; "the commissioner or clerk may consider any evidence offered to determine the individual's current or future ability to pay." RAP 14.2. Pursuant to RAP 15.2(f), where the trial

court has entered an order that a criminal defendant is indigent for the purposes of appeal, the finding remains in effect unless the appellate court finds the party's financial condition has improved to the extent that the party is no longer indigent. A party and counsel for the party who has been granted an order of indigency also must bring to the attention of the appellate court any significant improvement during review in the financial condition of the party. RAP 15.2(f). Washington appellate courts have recognized that there is broad discretion to grant or deny appellate costs. State v. Sinclair, 192 Wn. App. 380, 388, 367 P.3d 612 (2016)

Ability to pay is an important consideration in the discretionary imposition of appellate costs, but it is not the only relevant factor. State v. Grant, 196 Wn. App. 644, 651, 385 P.3d 184 (2016) (citing Sinclair, 192 Wn. App. at 389). "A defendant's poverty in no way immunizes him from punishment." Bearden v. Georgia, 461 U.S. 660, 669, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983). While a court may not incarcerate an offender who truly cannot pay court-imposed costs, the defendant must still "make a good faith effort to satisfy those obligations by seeking employment, borrowing money, or raising money in any other lawful manner." Bearden, 461 U.S. 660 (also see State v. Woodward,

116 Wn. App. 697, 703-04, 67 P.3d 530 (2003) "Probationer's failure to make sufficient bona fide efforts to seek employment or to borrow money or otherwise to legally acquire resources in order to pay his court ordered financial obligation may reflect insufficient concern for paying debt he owes to society for his crimes, and in such situation, court may revoke probation and use imprisonment as appropriate remedy.").

b. Imposition of costs is appropriate here should the State substantially prevail.

By enacting RAP 14.2 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. The fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes "recoupment of fees for court-appointed counsel." Obviously, all these defendants have been found indigent by the court. Under the defendant's argument, the Court should excuse any indigent defendant from payment of costs. This would, in effect, nullify RCW 10.73.160(3).

Another consideration in this case is Gary Bogle's lack of remorse regarding the damage he has done to his brother's life, directly resulting from the crimes to which he has plead guilty. After the victim in this case, Gary Bogle's own brother, gave his victim impact statement, the trial court judge remarked on Gary Bogle's behavior while hearing the statement.

> And I notice that your brother continued at times to chat with his attorney throughout and not listen, didn't give his full attention. I hope he rereads your statement that I am given to 20-plus years of damage he's done to your life. It's clear he really is without remorse.

VRP December 12, 2016 at 30-31.

According to Ronnie Bogle, much of the negative impact of his brother's crimes has been to his own personal finances. His victim impact statement articulates how his personal credit history was "destroyed by the age of twenty," how he has spent years of life fixing and improving his personal financial record, and how he was denied opportunities for career advancement because of the damage to his personal finances. CP 52-55. The nature of Gary Bogle's crime is such that including his own personal finances in his punishment is warranted. Specifically for this appeal, in the interest

of justice Gary Bogle should bear the expense of appellate costs, and not Washington State taxpayers.

D. CONCLUSION.

Based upon the foregoing arguments and authorities, the State respectfully asks this court to affirm Gary Bogle's five convictions for identity theft.

Respectfully submitted this 9 day of August, 2017.

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Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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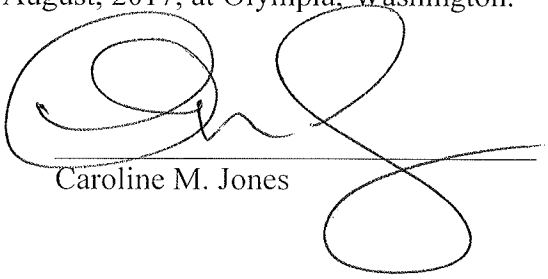
I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 9 day of August, 2017, at Olympia, Washington.



Caroline M. Jones

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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